STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs. SC No. 128294

JOEZELL WILLIAMS II,

Defendant-Appellee

Lower Court No. 02-004374
Court of Appeals No. 246706

128294 amicus / supplement

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of Question Presented

I.

Multiple punishments are not permissible where not legislatively authorized. Where a conviction for first-degree murder is supported by theories of both premeditation and that the murder was committed during the course of an enumerated offense, is a separate conviction for the predicate offense of that first-degree murder theory permissible?

Amicus answers "YES"

Statement of Material Proceedings And Facts

Amicus adopts the statement of facts of the People.

Argument

I.

Multiple punishments are not permissible where not legislatively authorized. Where a conviction for first-degree murder is supported by theories of both premeditation and that the murder was committed during the course of an enumerated offense, a separate conviction for the predicate offense of that first-degree murder theory is permissible.

A. Introduction: The Constitution and "Multiple" Punishment

The notion that the jeopardy clause precludes multiple punishments began with *Ex parte Lange.*[1] The statute under which Lange was convicted authorized a maximum sentence of one year in prison, or a fine of $200, the possible penalties stated in the disjunctive; the trial judge sentenced Lange to both. Because the sentence was in excess of the statutory authorization, the Supreme Court issued a writ of habeas corpus, and *Lange* has often been cited as resting on—and establishing—a "multiple punishments" component of the jeopardy prohibition. The Court, acknowledging that the sentence was in excess of statutory authorization, issued a writ of habeas corpus. As Justice Scalia has written, the opinion

> rested the decision on principles of the common law, and both the Due Process and Double Jeopardy Clauses of the Fifth Amendment....[and] went out of its way *not* to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." It is clear that the Due Process Clause alone suffices to support the decision, since the

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[1] *Ex parte Lange.* 18 Wall. 163, 21 L.Ed. 872 (1874).

> guarantee of the process provided by the law of the land... assures prior legislative authorization for whatever punishment is imposed.[2]

Seven decades after *Lange* Justice Frankfurter made the point that history confirms that the jeopardy clause is not concerned with multiple punishments, for "legislation ... providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress.... It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification."[3]

As Justice Scalia noted in his *Kurth Ranch* dissent, though sometimes referring to a prohibition against multiple punishments, it was not until the decision of *United States v. Halper*[4] that the Court ever found improper even a *successive* punishment that had been authorized by the legislature; all cases striking successive punishments had been grounded on the proposition that "[p]rotection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature."[5] And *Halper* did not long survive,

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[2] *Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 798-799, 114 S Ct 1937, 1955 - 1956, 128 L Ed 2d 767 (1994) (Scalia, J., dissenting).

[3] *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 555-556, 63 S.Ct. 379, 389-390, 87 L.Ed. 443 (1943) (concurring opinion of Justice Frankfurter).

[4] *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

[5] See e.g. *Ohio v. Johnson,* 467 U.S. 493, 498-499, 104 S.Ct. 2536, 2540, 81 L.Ed.2d 425 (1984); *Albernaz v. United States,* 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen*

being overruled by *Hudson v United States*.[6] There bank officers had been occupationally disbarred and had monetary sanctions imposed by the Office of Comptroller of Currency for their conduct, and were then indicted for misapplication of bank funds. They claimed that under *Halper* the criminal prosecution after the occupational sanctions was a second punishment, barred by the jeopardy clause. The Court promptly jettisoned *Halper*. As Justice Scalia well-summarized the matter in his concurring opinion, in bottling up the genie loosed by the *Halper* decision

> [T]oday's opinion uses a somewhat different bottle than I would, returning the law to its state immediately prior to *Halper*–which acknowledged a constitutional prohibition of multiple punishments *but required successive criminal prosecutions*. So long as that requirement is maintained, our multiple-punishments jurisprudence essentially duplicates what I believe to be the correct double-jeopardy law, and will be as harmless in the future as it was pre-*Halper*. Accordingly, I am pleased to concur.[7]

Amicus submits that it is the due process clause, rather than the jeopardy clause, that requires that punishment imposed after conviction be within that authorized by the legislature, but the approach is essentially the same no matter where the source of the prohibition is located.

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v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980) ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

[6] *Hudson v United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

[7] Hudson v. U.S. 522 US 93, 106, 118 S Ct. 488, 497, Scalia, J., concurring. And, as Justice Scalia noted in his *Kurth Ranch* dissent, "It has never been imagined, of course, that the commonplace practice of imposing multiple authorized punishments...after a *single* prosecution is unconstitutional." 511 US 767, 799-802, 114 S Ct 1937, 1956 - 1958.

B. Bigelow, Multiple Theories, and Predicate Offenses

(1) Offenses With Alternative Elements

There are some offenses that may be proven in more than one way. The offense in this situation is not divided, but simply has alternative elements, all of which may exist in a particular case. First-degree murder is a classic example. There is no such offense as "premeditated murder" with a separate offense of "felony-murder," each punishable by life in prison without parole. The offense is simply first-degree murder, and it may be proven by evidence of either premeditation, or that the murder occurred during the course of an enumerated felony. On occasion, the proofs may be sufficient for both these theories; that is, a premeditated murder occurred during the course of an enumerated felony. The practice in Michigan has been to charge the separate theories of the single crime as separate counts, and submit both to the jury, though it would be permissible to charge both theories in a single count without the need for a unanimous decision by the jury on each theory (so long as all twelve found that the crime of first-degree murder had been committed).[8] What is to be done, then, when the jury returns verdicts of the single crime (first-degree murder) on multiple theories?[9] For a time one count or the other was simply vacated, with no particular rationale as to which was chosen. It became apparent both that this could cause difficulties if the remaining count had difficulties, either instructional or evidentiary, while the count stricken did not. Because the conviction should be sustainable if either theory of conviction is sustainable, the practice was modified in *People v Bigelow.*[10] There the special panel correctly held that the two

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[8] *Schad v Arizona*, 501 U.S. 624, 649-652, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991).

[9] A question avoided when both theories are presented in one count, as in *Schad.*

[10] *People v Bigelow (Amended Opinion),* 229 Mich App 218 (1998).

theories—premeditation and during the course of an enumerated felony—should simply be merged into one conviction of first-degree murder, on both theories. This is quite correct; independent of principles of jeopardy or due process the law has always regarded multiple convictions based on one statute the violation of which has been proven in multiple alternative ways as merging.[11] The difficulty is that the special panel also directed that the predicate felony for the felony-murder theory of first-degree murder, which had resulted in a separate conviction, be vacated, without consideration of the fact that the first-degree murder there was also supported by a theory of premeditated murder. That the court gave no thought to the difference the existence of a premeditation theory of first-degree murder would make with regard to a conviction for the predicate felony of the felony-murder theory is not surprising, as the question was not raised by the defense until oral argument before the special panel, was never discussed in the first *Bigelow*[12] appeal, appears not to have been briefed,[13] and was conceded by the prosecutor at oral argument. The issue should now be decided with considered reflection

(2) Predicate offenses and multiple theories of first-degree murder

Amicus will not reiterate the arguments made in *People v Curvan,*[14] which this court dismissed after oral argument, as to why no constitutional principle should preclude conviction for both the predicate felony and a first-degree murder conviction based on an enumerated (the

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[11] Cf. *People v. Johnson,* 406 Mich. 320 (1979).

[12] *People v Bigelow,* 225 Mich App 806 (1997).

[13] *Bigelow, supra*, 229 Mich App at 221.

[14] *People v. Curvan*, 473 Mich. 896 (2005).

predicate) offense, but refers the court to the brief filed by the People in that case. Amicus maintains that conviction and sentence on both offenses violates no constitutional principle.

But here the defendant has been convicted of an offense—first-degree murder—supported not only by the element of its commission during the course of an enumerated felony, but also by the element of premeditation and deliberation. In this circumstance, whatever the fate of the current rule with regard to first-degree murder convictions based solely on predicate felonies and conviction also of that predicate felony, convictions and sentence for each conviction should stand. As the People have pointed out in this case, in this situation the separate felony conviction is no longer necessarily predicate, and the rationale of *People v Wilder*[15] no longer obtains. Cases cited by the People from other jurisdictions make this point.[16] This court should hold that both convictions and sentences stand in this situation.

Alternatively, this court should apply the rule of *Bigelow* in this situation, and also in the *Wilder* situation, where the first-degree murder conviction is not supported also by a theory of premeditation, and merge the counts. That is, the trial judge should proceed to sentence on the predicate felony, and the judgment of sentence should note that the conviction and sentence are "merged" with the first-degree murder conviction and sentence. In this way, should some defect cause reversal of the first-degree murder conviction in a way that does not affect the predicate felony (e.g. some instructional error with regard to the murder conviction, or some insufficiency of the

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[15] *People v Wilder,* 411 Mich 328 (1981).

[16] *Borchardt v State,* 367 Md. 91, 142-143 (2001): when "the trier of fact returns a guilty verdict of premeditated murder...the underlying felony and the murder in that situation contain an element not required in the other....The armed robbery convictions did not, therefore, merge into the premeditated murder convictions...and the imposition of separate sentences for the robberies was permissible."

evidence, such as causation), there would be no need to "revive" or "reinstate" the conviction and sentence for the predicate felony. Having been merged with the first-degree murder, and not having been vacated by the reversal of that portion of the judgment, it would simply still exist and its sentence would continue to be effective.[17] This is the most efficient manner in which to proceed (other than simply allowing, as amicus argues is appropriate, separate conviction and sentence for the predicate felony, at least where the first-degree murder is supported by a finding of premeditation by the jury in addition to the predicate-offense theory).

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[17] *Underwood v United States* 166 F3d 84, 85 -86 (C.A.2,1999); *Lindsay, supra,* 985 F 2d 666; *State v Santillanes*, 130 NM 464, 467-468 (N M, 2001)(ruling that merger of convictions is a remedial measure in response to a violation of the double jeopardy protection against multiple punishments for a single offense); *United States v Benevento* 836 F2d 60, 73 CA 2 (NY),1987) , abrogated on other grounds, *United States v Indelicato*, 865 F2d 1370, 1379 (CA 2 (NY),1989); *United States v Ganci, supra,* 47 F3d at 73 -74.

Relief

WHEREFORE, the amicus submits that this Court should either grant the People's application for leave to appeal or peremptorily reverse the decision of the Court of Appeals and reinstate Defendant's conviction and sentence for larceny from a person, or in the alternative direct that the conviction and sentence for that offense be merged with the first-degree murder conviction.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF MICHIGAN)
ss
COUNTY OF WAYNE)

The undersigned deponent, being duly sworn, deposes and says that he/she served a true copy of **BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN** upon:

NEIL J. LEITHAUSER - (P33976)

The within named attorney for defendant, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid on DECEMBER 6, 2005, plainly addressed as follows:

NEIL J. LEITHAUSER
Attorney for Defendant-Appellant
916 S. Main Street, Suite 300
Royal Oak, Michigan 48067

Olymphia Montgomery
Olymphia Montgomery

And said pleading was filed in the Court of Appeals, by PERSONAL SERVICE at the following address:

CORBIN R. DAVIS
Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48902

Subscribed and sworn to before me
this 6th date of December, 2005

Oneitha E. Edwards
Oneitha E. Edwards
Notary Public, Wayne County, Michigan
My commission expires on 01/23/09